IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CYNTHIA CHANCE fka CYNTHIA WILES, Petitioner/Appellee, v. DANNY F. WILES, Respondent/Appellant.	2 CA-CV 2006-0217 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. DO200400224

Honorable Kevin D. White, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 Appellant Danny Wiles contests the trial court's order denying his motion to terminate payments to his former wife, Cynthia Chance, based upon her remarriage. Wiles contends the court erred in determining the decree of dissolution intended the payments to

be both part of the property settlement and spousal maintenance. Finding no error, we affirm.

Factual and Procedural Background

¶2 Wiles and Chance were divorced in March 2005. Although Wiles was served with a copy of the petition for dissolution of marriage, he failed to participate in the proceedings and the decree of dissolution was entered following a default hearing. Paragraph seven of the decree provided in relevant part as follows:

> As an equitable division of property, [Wiles] shall pay [Chance] the sum of $150,000 to be paid at a rate of $1,500/mo. due on the 1st day of each month payable to [Chance]. . . . This payment shall also be in the nature of support and is in essence the remaining mortgage payment on the house that [Chance] is retaining.

In August 2006, Wiles filed a motion to terminate the monthly payments to Chance based solely on Chance having remarried. After a hearing, the trial court denied Wiles's motion, finding the $150,000 payment was "both an equitable division of property and a spousal maintenance payment." Since Chance had remarried, the court determined any spousal maintenance obligation had terminated, however, the decree was still enforceable as a property distribution. Wiles appeals the denial of his motion as well as the subsequent denial of a motion to reconsider the court's order.

Discussion

¶3 We review the trial court's interpretation of an existing decree of dissolution *de novo*. *Danielson v. Evans*, 201 Ariz. 401, ¶ 13, 36 P.3d 749, 754 (App. 2001). "The meaning of a decree is to be determined from the language used." *Stine v. Stine*, 179 Ariz.

385, 388, 880 P.2d 142, 145 (App. 1994). The language in a decree "should be construed according to [its] natural and legal import." *Lopez v. Lopez*, 125 Ariz. 309, 310, 609 P.2d 579, 580 (App. 1980).

¶4 Although cited by neither party, in *Barnett v. Barnett*, 95 Ariz. 226, 227, 388 P.2d 433, 434 (1964), our supreme court considered the issue of whether a spouse's remarriage would terminate payments under a decree that ordered: "Said sum of $7,302.42 is directed to be paid to the wife by the husband through the Clerk of the Court at the rate of $85 per month on 1st day of each month." The total amount awarded consisted of a combination of debt due on a community vehicle, amounts previously owed to wife from husband, and a lump sum of $6,000 representing "permanent alimony." *Id*. The court determined the award of "a lump sum payment . . . constitutes an absolute judgment and cannot be subsequently modified" and held that the wife's remarriage did not terminate the husband's obligation to make the payments required by the decree. *Id*. at 228, 388 P.2d at 435. We see no meaningful distinction between the facts in *Barnett* and the lump sum award payable over time in this case, and "[t]his court cannot 'overrule, modify, or disregard' supreme court precedent." *Hause v. City of Tucson*, 199 Ariz. 499, ¶ 16, 19 P.3d 640, 645 (App. 2001), *quoting City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993).

¶5 Wiles contends, however, we should reverse the trial court because it erred in determining the award contained in paragraph seven of the decree "was both an equitable division of property and a spousal maintenance payment." This argument overlooks Arizona

law and is without merit. In *Stone v. Stidham*, 96 Ariz. 235, 238, 393 P.2d 923, 925 (1964), our supreme court found proper and enforceable "a decree incorporating the property settlement which provides for certain payments as settlement of the parties' community interest together with the former [spouse's] right of support." Moreover, in *Barnett*, the court discussed lump sum awards """*whether payable immediately in full or periodically in instal[l]ments*,""" and found they could be """intended solely as a property settlement or as an allowance for support, *or both*."""" *Barnett*, 95 Ariz. at 228, 388 P.2d at 435 (second emphasis added), *quoting Cummings v. Lockwood*, 84 Ariz. 335, 339-40, 327 P.2d 1012, 1016 (1958), *quoting Ziegenbein v. Damme*, 292 N.W. 921, 923 (Neb. 1940). Similarly, in *McNelis v. Bruce*, 90 Ariz. 261, 270-71, 367 P.2d 625, 631 (1961), the court interpreted the language of a marital settlement agreement to determine whether amounts owed to the former wife were subject to garnishment.

> It is our conclusion that the payments set forth in the agreement were a substitute for defendant's rights in the community estate and incidentally as alimony or support and maintenance. As such the agreement was not subject to modification by the court at a future date, and the obligations arising thereunder being contractual are debts subject to garnishment.

Id. (citation omitted). Because our supreme court has repeatedly approved awards that were simultaneously a property settlement and an award of spousal support, the trial court could correctly determine this $150,000 award had a dual purpose and, thus did not terminate upon Chance's remarriage.

¶6 Additional Arizona cases clearly hold that spousal maintenance, when awarded as "a consideration for a property settlement . . . [is] the [spouse's] share in the property and

not subject to modification." *Gillespie v. Gillespie*, 74 Ariz. 1, 5, 242 P.2d 837, 839 (1952); *see also Stone*, 96 Ariz. at 239-40, 393 P.2d at 926; *McNelis*, 90 Ariz. at 270-71, 367 P.2d at 631; *Keller v. Keller*, 137 Ariz. 447, 448, 671 P.2d 425, 426 (App. 1983) (spousal maintenance not modifiable when awarded in exchange for spouse's release of claims to community property); *Lincoln v. Lincoln*, 24 Ariz. App. 447, 450, 539 P.2d 921, 924 (1975) (spousal support is "not subject to subsequent modification . . . if the payments are in any part consideration for a property settlement, since such payment would in effect be the spouse's share of the property").

¶7 At the hearing on Wiles's motion, Chance's counsel argued without contradiction that the $150,000 award represented Chance's community share of the automobile glass business allocated to Wiles in the decree. Assuming *arguendo* that paragraph seven also awarded spousal maintenance, that award was in consideration of a particular property settlement and was not modifiable. *See Stone*, 96 Ariz. at 239-40, 393 P.2d at 926; *McNelis*, 90 Ariz. at 270-71, 367 P.2d at 631; *Gillespie*, 74 Ariz. at 5, 242 P.2d at 839; *Keller*, 137 Ariz. at 448, 671 P.2d at 426; *Lincoln*, 24 Ariz. App. at 450, 539 P.2d at 924.

¶8 Relying on *Simpson v. Superior Court*, 87 Ariz. 350, 351 P.2d 179 (1960), Wiles also argues the trial court erred by failing "to determine whether a payment obligation imposed by a decree is a maintenance obligation or a property disposition obligation upon a spouse's filing of a request to modify." But *Simpson* does not even address, much less proscribe, the characterization of a specific obligation as both a property settlement and a

support obligation. *See id*. at 358, 351 P.2d at 184-85. Although Wiles chose to include an amended quotation from *Simpson* in his brief, the court actually stated: "The following statement in *Hough* [citation omitted] provides additional support *for holding prohibition to be an inappropriate procedure for review of the question here involved*." *Id*. (emphasis added). Because *Simpson* was before the court on a writ of prohibition where the only issue to be determined was "the jurisdiction of the court below," the court's holding was limited to whether the superior court "had jurisdiction to modify the divorce decree herein." *Id*. at 358-59, 351 P.2d at 185. Thus, any discussion in *Simpson* about the nature of particular provisions in the decree is *dicta* and cannot be dispositive of the issue as Wiles contends.

¶9 Wiles makes other arguments, including that the language of the decree is ambiguous as to the nature of the obligation imposed by paragraph seven. That claim is implicitly based on his contention that the obligation must be characterized as either support or property disposition and cannot be both. However, as discussed above, in Arizona obligations in a decree can be "'"intended solely as a property settlement or as an allowance for support, or both."'" *Barnett*, 95 Ariz. at 228, 388 P.2d at 435, *quoting Cummings*, 84 Ariz. at 339-40, 327 P.2d at 1016, *quoting Ziegenbein*, 292 N.W. at 923. In addition, the trial court specifically stated at oral argument the language of the decree was "not particularly ambiguous" but was written to fulfill two purposes.

¶10 Wiles also seems to claim, to the extent we understand this argument, that A.R.S. § 25-327 somehow requires that a particular provision in a decree be either a property settlement or spousal maintenance. It appears Wiles engenders a conflict between

subsections (A) and (B) of the statute where none exists. Subsection (B) terminates "future maintenance" obligations upon the remarriage of the recipient, while subsection (A) permits modification of support obligations and limited modification of property settlements in certain circumstances. § 25-327. The trial court correctly concluded that one purpose of paragraph seven was to effectuate the equitable division of the parties' community estate and, therefore, the payments would not terminate when Chance remarried.

¶11 Wiles lastly argues that Chance is "barred" from claiming the award is a property settlement under the doctrine of judicial estoppel because her petition for dissolution stated "[Wiles] was financially capable of providing 'reasonable support' to her," and because she later successfully sought enforcement after Wiles had failed to pay as ordered in paragraph seven. Chance responds she has not taken inconsistent positions, but simply asked that the decree be enforced as written. The single case cited by Wiles to support his argument, *Thompson v. Thompson*, 126 Ariz. 129, 613 P.2d 289 (App. 1980), is inapposite. First, the decree in *Thompson* specifically stated the wife's portion of husband's military retirement benefits was "awarded to the respondent as spousal maintenance." *Id*. at 130, 613 P.2d at 291. Here, the decree states the award is "an equitable division of property" which "shall also be in the nature of support." More importantly, the wife in *Thompson* had prevented her husband from discharging his obligation to her in a bankruptcy proceeding by characterizing the award as spousal maintenance, but then asked the superior court to reclassify it as a property settlement to prevent its termination after she remarried. *Id*. at 131-32, 613 P.2d at 291-92. This court held the wife was judicially estopped from arguing the

award was a property settlement, primarily because she had confessed reversible error by failing to file an answering brief. *Id.* at 132, 613 P.2d at 292. Here, Chance sought post-decree enforcement of the court's order and, despite Wiles's claims to the contrary, has not claimed the order was spousal maintenance and not part of the property settlement. Thus, judicial estoppel does not apply to prevent enforcement of the decree in this case.

Disposition

¶12 The trial court's orders denying Wiles's motion to terminate payments and his motion for reconsideration are affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge